

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

ERNEST A. MCCLAIN,

Petitioner,

v.

//

CIVIL ACTION NO. 1:16CV124
CRIMINAL ACTION NO. 1:94CR142
(Judge Keeley)

UNITED STATES OF AMERICA,

Respondent.

ORDER ADOPTING REPORT AND RECOMMENDATION [DKT. NO. 7]

On June 20, 2016, the pro se petitioner, Ernest A. McClain ("McClain"), filed a petition pursuant to 28 U.S.C. § 2255, which the Court referred to United States Magistrate Judge Michael J. Aloï for initial screening and a Report and Recommendation ("R&R") in accordance with LR PL P 2.

On October 4, 2016, Magistrate Judge Aloï issued a R&R, in which he recommended that the Court dismiss McClain's petition as an unauthorized second or successive § 2255 petition (dkt. no. 7 at 3-4). The R&R also specifically warned McClain that his failure to object to the recommendation would result in the waiver of any appellate rights he might otherwise have on this issue. Id. The parties did not file any objection.¹ Consequently, finding no clear error, the Court **ADOPTS** the R&R in its entirety (dkt. no. 7),

¹The failure to object to the Report and Recommendation not only waives the appellate rights in this matter, but also relieves the Court of any obligation to conduct a de novo review of the issue presented. See Thomas v. Arn, 474 U.S. 140, 148-153 (1985); Wells v. Shriners Hosp., 109 F.3d 198, 199-200 (4th Cir. 1997).

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DENIES McClain's petition (dkt. no. 1), and **ORDERS** that this case be **DISMISSED WITHOUT PREJUDICE** and stricken from the Court's active docket.

CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11(a) of the Rules Governing Section 2254 and Section 2255 Cases, the district court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant" in such cases. If the court denies the certificate, "the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22." 28 U.S.C. foll. § 2255(a). The Court finds it inappropriate to issue a certificate of appealability in this matter because McClain has not made a "substantial showing of the denial of a constitutional right." See 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard by demonstrating that reasonable jurists would find that any assessment of the constitutional claims by the district court is debatable or wrong, and that any dispositive procedural ruling by the district court is likewise debatable. See Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003). Upon review of the record, the Court concludes that McClain has failed to make the requisite showing, and **DENIES** a certificate of appealability.

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It is so **ORDERED**.

Pursuant to Fed. R. Civ. P. 58, the Court directs the Clerk of Court to enter a separate judgment order and to transmit copies of both orders to counsel of record and to the pro se petitioner, certified mail, return receipt requested.

Dated: June 6, 2017.

/s/ Irene M. Keeley
IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE